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No. 80-2162

In The

Supreme Court of the United States

October Term 1980

RAMAH NAVAJO SCHOOL BOARD, INC.

and

LEMBKE CONSTRUCTION CO., INC.

Appellants,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Appellee

ON APPEAL
FROM THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

MOTION FOR LEAVE TO FILE JURISDICTIONAL STATEMENT AMICUS CURIAE ON BEHALF OF THE NAVAJO TRIBE OF INDIANS AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

JURISDICTIONAL STATEMENT OF AMICUS CURIAE THE NAVAJO TRIBE OF INDIANS

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The Navajo Tribe of Indians respectfully moves this Court, pursuant to Rule 36 of the Rules of the United States Supreme Court, for leave to file the annexed jurisdictional statement amicus curiae. In support of this motion, the Navajo Tribe states:

1. The Navajo Tribe of Indians (the Navajo Tribe) is a federally recognized Indian Tribe and is the largest such tribe in the United States, comprised of one hundred sixty thousand members and occupying 25,000 square miles of trust lands within the states of Arizona, New Mexico and Utah.

2. The issue presented in this case -- the extent, if any, of a state's power to tax the activities of non-Indians performing federally-funded, federally-regulated work on tribal lands -- will determine whether, after White Mountain Apache and Central Machinery,[1] Indian tribes must share with states those funds ear-marked by Congress to further the national interest in Indian education.

3. The outcome of this appeal will determine whether federally funded programs implementing rights guaranteed to the

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[1] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).
Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980).

Navajo Tribe by the Treaty of 1868 can be crippled by the diversionary interference of state taxation.

For the foregoing reasons, the Navajo Tribe of Indians respectfully requests that its motion for leave to file the annexed jurisdictional statement amicus curiae be granted.

Dated this ____ day of August, 1981.

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JURISDICTIONAL STATEMENT OF AMICUS CURIAE THE NAVAJO TRIBE OF INDIANS

INTEREST OF AMICUS CURIAE

The Navajo Tribe of Indians is the single largest federally recognized Native American tribe, comprised of approximately 160,000 residents occupying 25,000 square miles of trust land in Arizona, New Mexico and Utah.

Numerous federally-funded programs are carried out on Navajo land with the help of services rendered by non-Indians. These services are taxed by the states, with the tax then passed through to the tribe to be paid with part of the federal funds.

States are notorious for their failure to provide governmental services to Indian peoples. Thus, funds diverted by the states from federal Indian programs are, for all practical purposes, lost to the tribe.

Where, as here, the federal funds are intended to build schools and where, as here, the federal government has by treaty committed itself to such school construction, the diversion by state tax laws of federal funds is particularly unconscionable and is, in fact, unlawful under the decisions of this Court.

THE QUESTIONS ARE SUBSTANTIAL

The questions concerning a state's taxing power, posited by the jurisdictional statement of the Ramah Navajo School Board Inc., are so substantial as to have been repeatedly addressed by this Court, although not before in the precise context of construction work on Indian lands in furtherance of treaty-guaranteed, federally-funded efforts to improve Indian education.

Time and time again this Court has found it necessary to address state taxation of non-Indians on tribal lands and time and time again the Court has rejected the mechanical application of a test of ethnicity in ruling on the propriety of the application of the state law. Instead, a balancing test has evolved which, on the one hand, weighs the interest of the state government in raising revenue and, on the other hand, weighs the

interest of the tribe in self-government together with the interest of the United States in protecting the federal trust relationship with Indians from disruption by the states.

Even the briefest review of the criteria applied by this Court in the area of state taxation of non-Indians on Indian lands demonstrates that the decision of the Court of Appeals of the State of New Mexico is in flagrant disregard of the guidelines established by this Court.

A. The Interest of the Navajo Tribe Is Strong.

This Court, in Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), upheld a state tax on cigarettes, rejecting an argument that such a tax would impermissibly interfere with tribal self-government.

In so holding the Court pointedly observed that a tribe's interest in self-

government was strongest for on-reservation activities involving the tribe. Id at 156-7.

The Court expressed particular doubt that the tribe had any "significant interest" (Id. at 155) in the purchase of cigarettes imported for the "non-Indian bargain hunters." Id. at 145. The Ramah tax case presents the diametrical opposite. The construction of a school on Navajo lands for Navajo children is most certainly an on-reservation activity significantly involving the Tribe.

Moreover, in Colville the Court could see "no nonrevenue purposes to the tribal taxes here at issue." Id. at 158. With Ramah, the Tribe's interest in voiding the application of the New Mexico tax goes beyond a savings in tax money -- the tribe's interest in invalidating the state tax is directly related to the size and quality of educational facilities to be provided for Ramah children

B. The New Mexico Tax Impermissibly Impedes the Implementation of Federal Indian Policies Relating to Education.

This Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) determined that the federal interest in timber industries on tribal lands was supported by both federal funding and detailed federal regulations, the effect of which was to preempt the application of any state taxes. The Ramah case falls squarely within the Bracker holding.

The facts before this Court in Bracker closely parallel those before this Court in the present Ramah case. Both the timber industry in Bracker and the educational system in Ramah are of vast importance to the respective tribes. 448 U.S. at 138. In Bracker and in Ramah, federal funding of the tribal program is critical. Id. at 139. In Bracker the tribe contracted with a non-Indian to harvest the timber; in Ramah

the Tribe contracted with a non-Indian to build the school. Id. at 139. In Bracker, federal regulations controlled the timber industry. Id. at 145. In Ramah, federal laws and regulations controlled the use of funds and the relationships between the School Board and the contractor. See Federal statutes and regulations reviewed in detail in the Jurisdictional Statement of the Ramah Navajo School Board, Inc., at 11-14 and 21.

In Bracker federal policies implemented by comprehensive regulations preempted an Arizona tax law which disrupted the federal Indian policies with respect to timber. Id. at 151. In Ramah comprehensive federal regulations should also preempt a New Mexico tax law which disrupts the federal Indian policy regarding the education of Navajo children.

C. The New Mexico Tax Impedes the Implementation of Federal Indian Policies Relating to Traders.

The decision of this Court in Central Machinery Co. v. Arizona Tax Comm'n, 448 U.S. 160 (1980) reaffirmed a prior ruling in Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). In each case this Court found that federal regulation of Indian traders was so comprehensive as to preempt the application of state tax laws to Indian traders. Because Central Machinery involved an unlicensed trader, the Ramah case fits precisely within its holding.

In Central Machinery there was an on-reservation sale of goods to a tribe by a non-Indian, not licensed as an Indian trader. Id. at 161. In Ramah there is an on-reservation sale of construction services to theNavajo Ramah School Board by a non-Indian contractor, also not licensed as an Indian trader.

Federal regulations applicable since 1976 to the Navajo Tribe encompass the provision of on-reservation services at a fixed location. 25 C.F.R. Part 252. In Central Machinery this Court held that it was the existence of such regulation which pre-empted state tax laws, not whether or not the regulations had in a particular instance been applied. 448 U.S. at 165.

In Central Machinery this Court reaffirmed the preemptive force of the federal Indian trader regulations. Id. at 166. It is this preemptive force which nullifies the application of the New Mexico tax to the non-Indian contractor providing construction services for the Ramah Navajo School Board.

CONCLUSION

The formal schooling of Navajo children was originally a goal solely of the federal government imposed by force upon the Navajo people. Treaty of 1868, Art. VI.

The Navajo Tribe has long since wholeheartedly embraced this goal and, with the help of federal funds, has in recent years done much to eradicate illiteracy among the younger generations. Diversion of federal funds intended to build Navajo schools by state tax laws is thus a serious infringement of Navajo self-government with profound consequences for the future well-being of the Navajo people. Moreover, the federal interest here involved has been encapsulized by detailed, comprehensive regulation; and such regulations, under the decisions of this Court, preempt the tax laws of the State of New Mexico.

For all the foregoing reasons, the Navajo Tribe submits as amicus curiae that the questions presented by the Ramah Navajo School Board for review by this Court are so substantial as to require plenary consideration, with briefs on the merits and

oral argument, for their resolution. The Navajo Tribe further submits that in this instance summary reversal would be appropriate.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, George P. Vlassis, attorney for the amicus curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing Motion and Jurisdictional Statement, and specifically that on August __, 1981, I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three copies of the foregoing Motion and Jurisdictional Statement addressed to each of the following:

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